Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

No. 94-1941

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Adarand Constructors, Inc. v. *Peña*, 115 S. Ct. 2097 (1995) 13
Caban v. *Mohammed*, 441 U.S. 380 (1979) 14
Califano v. *Webster*, 430 U.S. 313 (1977) 13
Califano v. *Westcott*, 443 U.S. 76 (1979) 14
Craig v. *Boren*, 429 U.S. 190 (1976) 13
Harris v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) 17
Heckler v. *Mathews*, 465 U.S. 728 (1984) 12
Hurley v. *Irish-American Gay Group of Boston*, 115 S. Ct. 2338 (1995) 2
J.E.B. v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) 14
Johnson v. *Transportation Agency*, 480 U.S. 616 (1987) 13
Lebron v. *National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995) 17, 18
Meritor Savings Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 17
Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 13
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 4
Parham v. *Hughes*, 441 U.S. 347 (1979) 12
Regents of Univ. of California v. *Bakke*, 438 U.S. 265 (1978) 13
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 14
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 12
Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 12
Sweatt v. *Painter*, 339 U.S. 629 (1950) 2
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 17

Constitution:

U.S. Const.:
Amend. I 2
Amend. XIV (Equal Protection Clause) 2, 13, 18

Miscellaneous: Page

Single Gender Education and the Constitution, 40 Loy. L. Rev. 253 (1994) 17

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993) 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

As we argue in our opening brief, there are three principal reasons why respondents' remedy fails, each of which is sufficient to require reversal here. *First*, the presumptive remedy for unconstitutional sex-based exclusion is to halt the use of the exclusionary classification; thus, absent the most persuasive reasons, the remedy for VMI's unconstitutional exclusion of women should be the termination of that policy. Respondents have virtually ignored the fact that this case presents a remedial question. Respondents have not justified continuing to exclude women from VMI, nor have they shown that their proposed remedy would erase, insofar as practicable, all the effects of their unconstitutional exclusion of women from VMI. Established remedial principles thus require that VMI's exclusionary admissions policy be enjoined. 94-1941 U.S. Br. 20-32, 48.[1] *Second*, VMI and VWIL are not just

[1] Respondents repeatedly argue (see, *e.g.*, Br. 17, 28 n.23, 30, 32 n.25) that this Court should defer to the district court regarding

separate single-sex programs for men and women, but programs that are substantially *different*, and meaningfully *unequal*.[2] The differences between the programs are, moreover, based on unconstitutional overgeneralizations and stereotypes.[3] *Third*, VMI is a well-established institution, and VWIL is new. Even if the methodology and other tangible benefits of VWIL could be made the same as VMI's, a substantial part of the value of VMI's education and degree derives from VMI's distinctive history, traditions, prestige, and alumni support. The VWIL plan cannot replicate the intangible benefits of VMI, and will reinforce rather than eliminate the state-sponsored stigma associated with excluding women from VMI.[4]

---

the remedy, and should defer to Virginia's design of its educational system. But there is no modern case or principle of which we are aware that would allow the crucial questions of whether VWIL and VMI are equal, and of whether the lower courts relied on impermissible sex-based stereotypes, to be reviewed under a deferential standard. Rather, those questions call for the same kind of "independent examination of the record as a whole, without deference to the trial court," as this Court has conducted in the First Amendment context. *Hurley* v. *Irish-American Gay Group of Boston*, 115 S. Ct. 2338, 2344 (1995). Deference to the State regarding the requirements of the Equal Protection Clause where any heightened level of scrutiny applies would be at odds with the entire history and purpose of the Fourteenth Amendment.

[2] See pages 5-9, *infra* (comparison chart); 94-1941 U.S. Br. 2-5 (describing VMI), 8-11 (describing VWIL).

[3] See pages 10-15, *infra*; 94-1941 U.S. Br. 9, 12, 14, 18, 37-40; 94-2107 U.S. Br. 9-10, 14-15, 18-20, 35 (discussing unconstitutional stereotyping).

[4] See 94-1941 U.S. Br. 16, 20, 22-25, 48 n.36; 94-2107 U.S. Br. 13-15, 34. Respondents cannot deny the vast "intangible" differences between VMI and VWIL. Although they attempt (Br. 27 n.22) to distinguish *Sweatt* v. *Painter*, 339 U.S. 629 (1950), on the ground that it involved a racial classification, they have offered no explanation why "those qualities which are incapable of objective measurement but which make for greatness in a * * *

1. Respondents misstate (Br. 15) the issue in this case as "whether a State may offer the option of single-sex education to both men and women as part of a diverse and primarily coeducational system of higher education." That is not the issue. The question presented here is whether a State may remedy the unconstitutional exclusion of women from an established and celebrated military-style public college by setting up a new, substantially different, non-military, women-only leadership program at a private women's liberal arts college, and whether it can

---

school," *id.* at 634, would be of less importance to women than to African Americans.

Respondents asert (Br. 26 n.21) that other colleges in Virginia have greater *academic* prestige than VMI, and that Mary Baldwin College's *academic* reputation is "comparable" to VMI's. As the district court recognized, however, "[t]he academic program (aside from physical education) at VMI is not unique." Pet. App. 200a. VMI's uniqueness derives instead from its "rigorous military training" and "barracks-centered lifestyle." *Id.* at 173a. VMI enjoys an established reputation and prestige *as a rigorous military school*, and it cannot be disputed that Mary Baldwin College and VWIL utterly lack those attributes. Respondents now seek to minimize VMI's reputation, but they insisted in the district court that VMI is "one of the nation's unique and most respected colleges," which "consistently appears on all lists of the nations [*sic*] finest colleges while maintaining the spartan lifestyle of its corps of cadets [and] offering quality education within the disciplined framework of a military environment." R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)) at 18 (¶ 91).

Respondents also emphasize (Br. 27) that VWIL women will have "access" to the VMI alumni network. But artificially "including" VWIL women in a VMI network cannot grant them the respect that VMI alumni have for one another "[a]s a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI." Pet. App. 205a. VMI's alumni network is unusually loyal precisely because its members are bonded to one another and to their school by the common experience they endured as students. Only if women are allowed to share that experience with men will they have a chance of standing on equal footing among VMI alumni.

justify the admitted substantial differences between the men's and women's programs based on stereotyped notions of what is appropriate for "most" women.

Respondents assert (Br. 18) that we seek an interpretation of the Constitution that would "forbid public single-sex education." That assertion is incorrect. The unconstitutionality of VMI's exclusionary policy and the inadequacy of respondents' remedy does not depend on the theory that single-sex education is unconstitutional.[5] Nor does this case present the situation, referred to in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 728 (1982), of public single-sex education that is justified in a particular case on remedial grounds.[6] In view of the history and purposes of VMI and VWIL, as well as the remedial posture of this case, VMI and VWIL also cannot possibly be characterized as constituting single-sex components of a nondiscriminatory system.

---

[5] See Pet. 16 & n.13; 94-1941 U.S. Br. 45; 94-2107 U.S. Br. 24-25.

[6] Respondents suggest that VWIL is constitutional for compensatory reasons. Br. 22, 36-37; but see *id.* at 39 n.29 (questioning whether single-sex education can ever be justified on compensatory grounds). VWIL was, in fact, established not to compensate women, but in an attempt to preserve VMI as an exclusively male institution. L. 318 (reciting the reason for VMI's support of VWIL as "[t]o preserve VMI"); Pet. App. 42a-43a (Phillips, J., dissenting) (the "overriding purpose [of VWIL] is not to create a new type of educational opportunity for women, * * * nor to further diversify the Commonwealth's higher education system[,] * * * but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character"). But even if respondents had shown that VWIL was established as a form of affirmative action for women, the existence of VWIL could not justify continuing to exclude qualified women from VMI. The notion that *some* women may need an affirmative action program does not mean that such a program can be the *only* alternative for women who are ready and willing to compete alongside men without it. This Court has never approved an affirmative action plan as a justification for excluding qualified women or minority-group members from a non-affirmative-action alternative.

2. Respondents assert that "as a factual matter it is simply not true that women are denied the educational benefits afforded to men at VMI," Br. 38, and that VWIL provides "the[] very same benefits to its students" as VMI provides to the men it admits, Br. 24. Those assertions are flatly contrary to the factual findings of the district court. The district court acknowledged that "the United States showed unequivocally that the VWIL program differed from VMI in many ways." Pet. App. 68a. The court correctly concluded that VWIL "differs substantially from the VMI program." *Id.* at 55a; see also *id.* at 26a (court of appeals' conclusion that VMI and VWIL "differ in approach"). The following chart comparing characteristic elements of the two programs makes clear that they are sharply different in virtually all material respects:

1. Military Model

VMI	VWIL
VMI provides "military-type training." Pet. App. 5a. The military system characterizes life at VMI. L. 33. Cadets live within a pervasively military framework. Pet. App. 141a, 200a.	VWIL "w[ill] not rely on the pervasive military life," Pet. App. 10a, but will instead provide "special leadership training," *id.* at 5a. Mary Baldwin Task Force "determined that a military model * * * would be wholly inappropriate for educating and training most women for leadership roles." *Id.* at 63a. Mary Baldwin "is not a military school." *Id.* at 126a.

2. Educational Methodology

VMI	VWIL
VMI uses "adversative" system that tests students to their limits and aims to leave them with a sense of accomplishment and knowledge of their true capacities. Pet. App. 191a-193a.	"VWIL program differs from VMI in methodology since VWIL would not rely on the * * * adversative method[] to achieve its goals." Pet. App. 10a. Instead, "the VWIL concept proposes a cooperative method which reinforces self-esteem rather than the leveling process used by VMI." *Id.* at 63a-64a. See also *id.* at 67a.

3. Residential Life

All cadets are required to live in the barracks all four years. "[T]he most important aspects of the VMI educational experience occur in the barracks," which are "crucial to the VMI experience." The barracks are stark and unattractive. Pet. App. 197a-199a.

There will be no barracks at VWIL. "The residential life for VWIL students will vary significantly from the residential life of VMI students." Pet. App. 66a. VWIL students are required to live together in the VWIL house for one year only, *ibid.*, and may live off-campus, 94-1667 & 94-1717 (*VMI II*) C.A. App. 505. Neither the VWIL house nor any other Mary Baldwin dorm is operated on a military format. Pet. App. 66a-67a; *VMI II* C.A. App. 502-504. The Mary Baldwin dorms are plush and comfortable Pet. App. 127a.

4. Peer Group and Students' Relationship to Community

VMI has approximately 1300 students, all of whom are required to participate in VMI's military-style educational program. Pet. App. 5a. Students at VMI are "totally removed" from the larger community." *Id.* at 199a.

VWIL is planned and funded based on the expectation of approximately 25-30 students, who will participate in a women-only leadership program within the context of a predominately women's liberal arts college with approximately 1300 students. Pet. App. 10a, 123a. VWIL students will not be isolated from the larger community. *Id.* at 115a.

5. Privacy

VMI students are subject to a "total lack of privacy in the barracks," and to "constant scrutiny" and "minute regulation of individual behavior." Pet. App. 140a.

VWIL students' privacy will be respected, as it ordinarily would be in a student dorm. Pet. App. 128a.

6. "Rat Line"

First-year students are referred to as "rats" and are "treated miserably for the first seven months of college." Pet. App. 194a. The rat line includes "indoctrination, egalitarian treatment, rituals * * *, minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors." *Id.* at 194a-195a.

VWIL will not use a rat line or any similar feature. Pet. App. 64a.

7. Honor Code

VMI's honor code "dominates all facets of institutional life," and provides that a cadet "does not lie, cheat, steal nor tolerate those who do"; students who violate it are expelled upon their first infraction. Pet. App. 197a.

VWIL will be governed by Mary Baldwin's preexisting Honor System, which is not enforced with the single sanction of expulsion. Pet. App. 115a; *VMI II* C.A. App. 649-650.

8. Uniforms

VMI cadets are required to wear uniforms at the Institute at all times. L. 34.

VWIL students will not wear uniforms during the day except while participating in ROTC or Virginia Corps of Cadets activities. Pet. App. 111a.

9. Military Drill

VMI cadets are required to participate in daily military formations and drill at VMI, in addition to drilling with ROTC and Virginia Corps of Cadets. L. 273-274.

VWIL students will not participate in military formations or drill, other than in ROTC or for ceremonial occasions with the Virginia Corps of Cadets. *VMI II* C.A. App. 502, 643.

10. Academic Program

VMI offers Bachelor of Arts and Bachelor of Science degrees in liberal arts, science, and engineering. Pet. App. 200a.

Mary Baldwin College/VWIL will offer no Bachelor of Science degree, and will not offer engineering classes or degrees on campus or at public expense. "MBC does not have a math and science focus." Pet. App. 131a.

11. Prestige, History, and Tradition

VMI is nationally known as a military school. VMI's "success and reputation are uncontroverted," and "it is apparently that very success in producing leaders that has made admission to VMI desirable to some women." Pet. App. 138a. VMI has traditions associated with its military system, like the "rat bible" (L. 158-191, 263-264) and "breakout" (L. 277-281).

"[T]he VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." Pet. App. 27a. Mary Baldwin's reputation is as "an excellent small liberal arts college for women" emphasizing "liberal disciplines." R. 259a (United States' Proposed Findings of Fact and Proposed Conclusions of Law: Remedial Trial (Mar. 8, 1994)) at 63 (¶ 414). Mary Baldwin has fun-oriented, nonmilitary traditions, like Apple Day and Peanut Week. *VMI II* C.A. App. 633-634; see also R. 259a, at 26 (¶ 177), 55 (¶ 366).

12. Alumni Network

VMI has "thousands of alumni," Pet. App. 137a, and its alumni network is "enormously influential," especially in male-dominated fields of engineering, military, business, and government. 94-1667 & 94-1717 (*VMI II*) Tr. 1227-1228; see also Pet. App. 137a-138a.

VWIL is a new program with no alumni. VWIL students would have "access" to VMI placement services. Pet. App. 120a-121a.

13. Endowment

VMI has a $131 million endowment, the largest on a per-student basis of any undergraduate college in the United States, public or private, and it has received an additional $220 million in future commitments. Pet. App. 130a.

Mary Baldwin College has a $19 million endowment, and $35 million in future commitments. Pet. App. 130a. VMI has pledged to pay Mary Baldwin an additional $5.5 million for VWIL (which Mary Baldwin will retain whether or not VMI becomes coeducational by court order or otherwise). L. 319-320.

14. Relation to the State

VMI is a state college. Pet. App. 138a.

VWIL is a publicly supported program run by, and on the campus of, a private college. Pet. App. 8a.

In short, VMI is a rigorous military school; VWIL is not. VMI is an established and renowned institution with a powerful alumni network; VWIL is a new, small program that is virtually unknown, except for its connection with this litigation. VWIL may employ valuable methodologies that could be beneficial to many students, both women and men, for whom VMI is unsuitable. VWIL does not, however, remotely constitute an adequate educational program for those women who want to attend VMI, and are qualified for and would benefit from its very different program.[7]

---

[7] Respondents assert (*e.g.*, Br. 2) that our opening brief contains an inaccurate discussion of the facts. That is not true. Respondents, for example, dispute (Br. 4 n.2) that they selected the remedial Task Force, but our point is not whether they delegated that job to someone of their choosing or selected each member themselves, but that neither the United States nor the court was involved in the selection of the Task Force and the development of the VWIL remedial proposal. Respondents also take issue (Br. 5 n.4) with the assertion that the Task Force did not consult anyone at VMI in planning VWIL's curriculum. But the President of Mary Baldwin College acknowledged at trial that, in designing the curriculum for VWIL, neither she nor her staff consulted with anyone at VMI. *VMI II* C.A. App. 653. Respondents dispute (Br. 9 n.9) the statement that VWIL will have no military framework other than the ROTC program. The Dean of Mary Baldwin College testified, however, that VWIL's "military component is a program in ROTC." *VMI II* C.A. App. 450. Respondents further assert (Br. 10 nn.11-12) that we incorrectly stated that VWIL will not use VMI's dyke and class systems. But the description of VWIL's mentoring program and class system makes clear that they are sharply different from those systems at VMI. See Pet. App. 115a-116a (describing VWIL) and *id.* at 196a (describing VMI). Respondents contend (Br. 8 n.8) that, in addition to Army ROTC, VWIL students will have access to Air Force and Navy/Marine ROTC. That assertion,

The court of appeals approved the remedial plan, not because it believed that VWIL and VMI were equal, but because, under its "special intermediate scrutiny test," it expressly disavowed any requirement of equality. Pet. App. 17a-18a & n.*. Under the third prong of that test, the court required only that separate programs be "substantively comparable," or "aimed at achieving similar results." *Id.* at 17a, 26a. The court thus approved VWIL despite its major differences from VMI because it believed that the two programs' "missions are similar and the goals are the same," even though "[t]he mechanism for achieving the goals differ." *Id.* at 26a. As we have shown, the court of appeals' test is far too permissive of different treatment based solely on sex. Pet. 18-19; 94-1941 U.S. Br. 47-48 & n.35.

3. Respondents seek to justify the differences between VMI and VWIL by asserting (Br. 28-38) that those differences are not based on improper stereotyping. In our opening brief, we have reviewed at length the impermis-

---

however, does not contradict the statements regarding ROTC in our opening brief. See U.S. Br. 9-10 & n.6 (recounting that the VWIL military framework is provided by ROTC, and that Mary Baldwin had only one student in ROTC when VWIL was planned, and no Mary Baldwin student was commissioned during the preceding three years).

Respondents cite to Defendants' Third Status Report to support assertions regarding the nature of the VWIL program. See Resp. Br. 7 n.6, 9, 10; see also *id.* at 3, 8 & n.7 (citing to earlier status reports reprinted in 94-1941 Br. in Opp. App.). This and other status reports were filed in the district court well after that court approved the VWIL remedy based on the litigated record. Such postjudgment factual submissions are not part of the record in this case; the case must be decided on the record that was before the district court and the court of appeals when they approved the VWIL remedy. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 555 (7th ed. 1993) (citing cases). Petitioner has had no opportunity to test in adversary proceedings the accuracy and completeness of assertions made in those status reports.

sible stereotypes that underlie respondents' remedial proposal. See 94-1941 U.S. Br. 37-44. Respondents attempt to minimize the stereotypes that their own experts employed by referring to quotations from those experts as mere "snippets" that are "contradicted" by the court's findings (Br. 30) (or, even more inexplicably, by dismissing their own experts' testimony as the United States' "opinions" (Br. 29)). The district court, however, expressly relied on sex-based generalizations proffered by defense experts. See, *e.g.*, Pet. App. 64a, 73a-76a, 223a-225a.

Respondents concede (Br. 29) that the generalizations made by their experts and accepted by the courts were overbroad. Most college-aged women are not depressed, pathologically self-disciplined to the point of anorexia, emotionally fragile, and passive, or more dating- and marriage-oriented than men, see 94-1941 U.S. Br. 9, 37-44.[8] Indeed, many women would prefer VMI, Pet. App. 76a, can do everything that is currently required of male cadets there, *id.* at 170a, and would "thrive" in VMI's current environment, *id.* at 172a.[9]

---

[8] There are, as the district court found, "significant areas of developmental overlap" between men and women. Pet. App. 224a. The uncontradicted testimony on psychological similarities between the sexes was that women and men show much greater similarity than difference, and that sex is not an accurate predictor of *any* psychological traits. See R. 259a, at 6 (¶¶ 30-31). Nor does sex correlate with any particular learning style. *Id.* at 4-5 (¶¶ 21-27).

[9] Respondents describe the United States as condemning any sex-based generalization "if there exists a single person" for whom the generalization is not accurate. Br. 17; see *id.* at 32, 41. The reality is that, even with its current, men-only admissions policy in place, VMI received over 300 inquiries in two years from women interested in attending, Pet. App. 141a, 229a, and the district court found that, if VMI admitted women, 10% of its student body—or approximately 130 students—would be women, *id.* at 232a. Respondents also ignore the finding that "15% of the females in the [projected] applicant pool could successfully meet the requirements of the current VMI physical fitness test." *Id.* at 234a. In

Contrary to respondents' contention (Br. 16), this Court's decisions do not support respondents' reliance on sex-based stereotypes. No modern equal protection case has relied on overbroad, sex-based generalizations completely to foreclose to individuals, solely on the basis of their sex, an opportunity for which they were otherwise qualified. See 94-2107 U.S. Br. 15-16; 94-1941 U.S. Br. 42-44. The cases respondents cite (Br. 32-34, 41 & n.31) dealt either with sex-based classifications justified based on legal differences between women's and men's status that were not challenged,[10] or with affirmative action programs that did not foreclose opportunity to either men or women.[11]

---

any event, even if only one qualified woman sought to attend VMI, respondents have failed to offer any constitutionally sufficient justification for excluding her solely on the basis of her sex.

[10] Sex-based classifications that depend on underlying unchallenged sex-based laws are not overbroad where the underlying laws apply categorically to all members of one sex. Virtually all of the cases respondents cite in support of their reliance on sex-based stereotypes are of this type. For example, in *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975), the Court upheld a Navy up-or-out policy that gave women officers longer to achieve a promotion or face mandatory discharge because unchallenged "current restrictions on women officers' participation in combat and in most sea duty" categorically restricted women's, but not men's, promotional opportunities. In *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981), the Court upheld the sex-based exclusion of all women from the draft, concluding that "[m]en and women, because of the combat restrictions on women"—which plaintiffs did not challenge—"are simply not similarly situated for purposes of a draft or registration for a draft." Similarly, in *Parham* v. *Hughes*, 441 U.S. 347, 355 & n.6 (1979) (plurality opinion), the Court upheld a Georgia statute under which a father who has not legitimated his child cannot sue for her wrongful death, because under state law "only a father can by voluntary unilateral action make an illegitimate child legitimate," and the legitimation statute's applicability only to men was not challenged. See also *Heckler* v. *Mathews*, 465 U.S. 728, 746-747 (1984) (upholding temporary transition rule designed to protect reasonable reliance on invalidated sex-based social security statute).

[11] Cases that have permitted sex-based classifications in the context of affirmative action programs do not support respondents'

Respondents assert (Br. 16) that the Equal Protection Clause permits reliance on sex-based "psychological and sociological norms." This Court, however, correctly looks upon sex-based psychological and sociological generalizations with particular skepticism. "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig* v. *Boren*, 429 U.S. 190, 204 (1976). General conclusions about the psychology or sociology of an entire sex reflect gender roles that have been substantially socially constructed, and that bear the deep imprint of decades of traditional ways of thinking about men and women.

---

reliance on sex-based generalizations in this case. Affirmative action that was designed to remedy sex discrimination, such as was at issue in *Califano* v. *Webster*, 430 U.S. 313 (1977) (per curiam), addresses harms that are by their nature class-based. A class-based response for such harms may accordingly be necessary. See *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995). The law at issue in *Webster* (which had been repealed as no longer needed by the time the case was decided), allowed women to exclude three more low-earning years than could men from the average salary level used to calculate their social security benefits. The Court upheld that sex-based difference because it "was deliberately enacted to compensate for particular economic disabilities suffered by women" in the job market, and it "work[ed] directly to remedy some part of the effect of past discrimination." 430 U.S. at 318, 320. Perhaps more importantly, the kinds of affirmative action that this Court has upheld—unlike VMI's exclusionary admissions policy—do not completely foreclose to one group the opportunities that are affirmatively extended to another. Thus, under *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978), non-minorities remained eligible to own the same radio stations and attend the same medical school that affirmative action programs sought to also make available to members of racial minorities. And under *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), even though women's sex was considered as a "'plus' factor," *id.* at 656 (O'Connor, J., concurring in the judgment), men remained eligible to compete for and fill any of the traditionally sex-segregated jobs to which the affirmative action plan applied.

See 94-1941 U.S. Br. 43-44. Since 1976, when this Court in *Craig* adopted an elevated standard of review of sex-based classifications, it has *never* upheld an exclusionary classification based on a psychological or sociological generalization. See, *e.g.*, *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) (rejecting generalization that women "hold particular views simply because of their gender"); *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979) (rejecting generalizations that fathers have the "primary responsibility to provide a home and its essentials" and that mothers are the "center of home and family life"); *Caban* v. *Mohammed*, 441 U.S. 380, 389 (1979) (rejecting generalization that biological mothers bear a more intimate relationship with their children than biological fathers); cf. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984) (condemning "generalizations about the relative interests and perspectives of men and women").

Respondents attempt to distinguish the psychological and sociological generalizations upon which they rely as "real" sex differences and "not stereotypes." Br. 28. Respondents evidently do not understand the meaning of the term "stereotype." This Court has firmly established that a State cannot rely on generalizations—even if they are factually supportable as generalizations—to exclude individual women or men from a valuable opportunity solely because of their sex. In this regard, respondents ignore entirely the Court's recent decision in *J.E.B.*, 114 S. Ct. at 1427 n.11, which emphasized that, even if there is a measure of truth in a gender stereotype, the State cannot rely on the stereotype to "mak[e] judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." See also 94-1941 U.S. Br. 43-44.

Respondents' approach would severely erode the principle of equal protection. It could, no doubt, have been "proved" by expert psychological or sociological testi-

mony in 1982, and found as a fact, that more women than men preferred to be nurses, or that women "tend to" be better suited for nursing because "most" women had more nurturing and tolerant personalities than "most" men. Similarly, sociological experts would no doubt have overwhelmingly agreed that, in 1979, most fathers did in fact bear the primary responsibilities as breadwinners, most mothers in fact were the center of home and family life, most biological mothers in fact had more intimate relationships with their children than did most biological fathers, and many persons were satisfied with those roles. But such testimony and findings would no more have rendered constitutional the restrictive sex-based policies at issue in *Hogan*, *Westcott*, and *Caban* than can the expert testimony and findings in this case that "most" women are not sufficiently confident and aggressive to withstand VMI's training sustain the categorical exclusion of women from VMI.

4. Respondents have completely failed to substantiate their vague assertions that VMI could not withstand the admission of women. Neither the lower courts nor respondents have ever explained exactly how women's admission to VMI would "destroy" it. The admission of women would change VMI, just as the admission of blacks following *Sweatt* changed the University of Texas Law School, but changes made necessary by including a previously excluded group cannot—simply because they are changes—be a constitutional justification for continued exclusion.

With respect to privacy, respondents make the exaggerated contention (Br. 44) that allowing men and women privacy from members of the other sex while using the bathroom and changing clothes would "separat[e] VMI's student body into two distinct gender groups, each continually asserting privacy rights as against the other." It is unclear how the fact that men may close a

bathroom door to women, or vice versa, defies the "leveling" process that VMI purports to foster. The notion that an institutional requirement of group nudity could be used to exclude women from a male institution they would otherwise have a constitutional right to attend is preposterous. See 94-1941 U.S. Br. 27-28.

With regard to physical training, respondents utterly ignore the findings that many women can succeed within the VMI methodology, and are capable of doing all of the individual activities that are now required of VMI cadets, including the military drills and physical training *in accordance with the current standard established for VMI's exclusively male student body*. Pet. App. 76a, 223a, 234a. Thus, even if any changes in physical training would "destroy" VMI's program (a conclusion we reject), the current physical requirements certainly do not justify excluding those women who can meet them. Nor has VMI shown any important interest that would be affected were it to make minor adjustments in its physical training standards, such as by having women do flex-arm hangs instead of pull-ups. See 94-1941 U.S. Br. 28-29; 94-2107 U.S. Br. 30.[12]

Respondents' most mystifying assertions pertain to their theory that VMI could not withstand the admission of women because it could not "accommodate" cross-sex confrontation and harassment. 94-2107 Br. 18-19; see 94-1941 Br. 45-46 & n.35. The presence of women would, however, not affect the ability of any cadet to "harass" or make demands of any other cadet, so long as the harassment was not sex-based.[13] A similar situation already exists at VMI with respect to the school's black cadets, who are protected from race-based "harassment." Presumably, the adversative system does not depend on harassment that is sex- or race-based.[14]

[12] The national military physical training standards allow women, based on physiological differences, to do flex-arm hangs rather than pull-ups. Pet. App. 235a. Those are the standards that VWIL women are held to, and respondents assert (Br. 9) that the VWIL program is of equal physical rigor to VMI's.

[13] Respondents' suggestion that any "harassing" pressures placed on a woman could be grounds for a hostile-environment claim is a misstatement of the law. See, *e.g.*, *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986). Women in many contexts, including education, endure tremendous stresses and "harassing" interpersonal interactions that are perfectly legal because not based on their sex.

5. Respondents argue (Br. 47-48) that the United States waived the argument that strict scrutiny should be applied to classifications that deny opportunities to individuals based on their sex. One waives claims, however, not legal arguments. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)).[15]

The United States' consistent claim in this case has been that VMI's men-only admissions policy, and the

[14] If VMI students traditionally employ sex-based epithets that would constitute sexual harassment when applied to women, however, such practices cannot justify excluding women, but would have to be abandoned. *Cf. Single Gender Education and the Constitution*, 40 Loy. L. Rev. 253, 270 (1994) (remarks of Sara L. Mandelbaum) (describing testimony of Citadel cadet Ronald Vergnolle that, at the Citadel, "the most common insult that was hurled at cadets who did not meet the required standard of masculinity was to call them * * * 'wom[e]n'").

[15] Contrary to respondents' contentions (Br. 47-48 & n.36), the United States did not affirmatively disavow strict scrutiny in the court of appeals. Moreover, respondents contended in the court of appeals that the United States "attempt[ed] to impose strict scrutiny by another name," 91-1690 VMI C.A. Br. ii, 35, and they opposed it, *id.* at 35-41; see also R. 152, at 111-113 (¶¶ 23-25) (respondents' argument in district court that strict scrutiny is not applicable).

VWIL remedy, violate the Equal Protection Clause. There is no question that the equal protection claim is preserved. Our argument about the level of scrutiny does not present a new claim, but rather addresses the standard under which the equal protection claim should be decided. We argued in the court of appeals, as we continue to assert here, that the invalidity of both VMI's exclusionary policy and the remedy the court of appeals adopted is clear even under intermediate scrutiny. The question whether strict scrutiny should apply here is "not a new claim within the meaning of that rule, but a new argument to support what has been [our] consistent claim." *Lebron*, 115 S. Ct. at 965.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals regarding remedy should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40042